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Supreme Court, U.S.
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No. 04-540

IN THE

Supreme Court of the United States

BAYOIL SUPPLY & TRADING LTD.,

Petitioner,

v.

GULF INSURANCE CO; CERTAIN UNDERWRITERS AT LLOYDS SUBSCRIBING TO CERTIFICATE 41557; LLOYDS OF LONDON SYNDICATES #2724, 0079, 1221, 0002, 1183, 0488, 2488, and 0079; TERRA NOVA INSURANCE COMPANY LIMITED; CGU INTERNATIONAL INSURANCE PLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

GEORGE F. CHANDLER, III
HILL RIVKINS & HAYDEN LLP
712 Main Street, Suite 1515
Houston, TX 77002-3209
(713) 222-1515

Attorneys for Respondents

191507

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in applying the laws of Texas to the Policy and its Shortage, Leakage and Contamination endorsement?

2. Did the Court of Appeals err in determining that the Policy covered only physical losses and not financial losses?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Gulf Insurance Company, has the following parent corporation:

> Gulf is a wholly-owned subsidiary of Commercial Insurance Resources, Inc., which is a wholly-owned subsidiary of the Travelers Indemnity Company, which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The St. Paul Travelers Companies, Inc., a public company.

No other publicly-held company owns 10% or more of Gulf's stock.

Respondent, Terra Nova Insurance Co. Ltd., now known as Markel International Insurance Co. Ltd., has the following parent corporation:

> Markel International Ltd., a subsidiary of The Markel Group.

No other publicly-held company owns 10% or more of Terra Nova.

Respondent, CGU International Insurance P.l.c., has the following parent corporation:

> Aviva, P.l.c.

No other publicly-held company owns 10% or more of CGU.

Respondent, Lloyd's Syndicate 0079, has the following corporate participation:

Limit (No. 3) Limited, a subsidiary of QBE Insurance Group Ltd.

No other publicly-held company owns 10% or more of Syndicate 0079.

Respondent, Lloyd's Syndicate 2724, has the following corporate parent:

QBE Corporate Limited, a subsidiary of QBE Insurance Group Ltd.

No other publicly-held company owns 10% or more of Syndicate 2724.

Respondent, Lloyd's Syndicate 2488, has the following corporate parent:

Ace Ltd.

No other publicly-held company owns 10% or more of Syndicate 2488.

The following Lloyd's Syndicates have no corporate parent, nor does any publicly-held company own 10% or more the Syndicate:

Syndicate 0002 a/k/a P.D. Upton & Others

Syndicate 0488 a/k/a J.R. Charman & Others

Syndicate 1183 a/k/a Talbot Syndicate 1183

Syndicate 1221 a/k/a the Millenium Syndicate

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INTRODUCTION

The United States Court of Appeals for the Fifth Circuit interpreted a marine cargo insurance policy in accordance with the body of Texas law which governs commercial insurance policies issued in the State of Texas. No issue of maritime or federal law arose in either the Court of Appeals or the District Court. The Court of Appeals' unpublished decision contains no issues of national or international importance.

Petitioner submits issues of contractual interpretation which do not involve any public policy considerations. Petitioner's stated reason for seeking review by the Court is that the United States Court of Appeals for the Fifth Circuit purportedly misapplied the plain language of the policy. However, the case: 1) presents no departure from the law of Texas; 2) raises no federal, constitutional, statutory, or regulatory issues; 3) does not present a conflict between any Circuit Courts of Appeal; 4) does not involve a departure from the accepted and usual course of judicial proceedings; and 5) does not raise issues of importance except to the parties. Accordingly, there is no reason for the Court to review this case.

STATEMENT OF THE CASE

Respondents rely upon the basic facts of the case as set forth in the Court of Appeals decision (Petition, App. 2-3) as more accurate than Petitioner's statement. In particular, Respondents do not agree with Petitioner's incomplete citations of the language of the insurance policy and the endorsement. For purposes of clarification, Respondents

specify the applicable language of the endorsement (bold type and underlining appear in the original):

SHORTAGE, LEAKAGE AND CONTAMINATION ENDORSEMENT

THIS INSURANCE ALSO COVERS:

Loss due to shortage and/or leakage and/or contamination and/or loss in weight (or volume) howsoever arising, provided, however, that such claims are payable only in excess of the Deductible Average contained in the Average Terms and Conditions provided herein.

* * *

I. **Provided** there has been full compliance with the following warranties and conditions:

* * *

2. **At time of, and during, loading** – Warranted that careful measurements as to gauge, weight and temperature of the separable components of the shipment be ~~made~~ and certified to by a Surveyor, who shall also supervise loading and *repeat (and certify to) such measurements as frequently as he deems necessary and desirable*, and who shall make every effort to use the latest IP/API methods of measurement.

3. **Prior to, and during, discharge** – [Identical to 2 above, except that "shall also supervise loading" reads "shall also supervise outturn"].

* * *

II. **Shortage and/or leakage losses** – if recovered hereunder, shall be determined by a comparison of:

The survey or surveys made at points of origin with the survey or surveys made at point of destination, subject always to the deductible . . .

III. **Notwithstanding the foregoing**, in the event the Insured is unable to comply with the aforementioned conditions and/or warranties for any reason or an approved Loss Control Surveyor does not attend the loading, transhipping point, or discharge . . . Insurers agree to use the Bill of Lading figures so calculated for comparison with discharge figures and the calculation of claims . . .

(italics supplied)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit correctly applied Texas law to both the insurance policy and the endorsement.

With respect to marine insurance policies, the Court has long held that in the absence of a controlling federal admiralty law principle, the interpretation of such policies is purely a matter of state law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 315, *reh'g denied*, 349 U.S. 907 (1955). Petitioner does not contend that any controlling federal admiralty law principle applies in this case, thus the interpretation of the policy is a matter of Texas law. *Id.*

Petitioner's attempt to take the endorsement phrase "however arising" out of context is without foundation under Texas law. Petitioner raised the argument in the District Court, but the District Court rejected that approach; instead, the District Court utilized a section heading in the Endorsement to hold that no corrected survey report could be used (Petition, App. 14). Under Texas law, the Court's primary concern in construing an insurance policy is to "ascertain the true intentions of the parties as expressed in the instrument . . . courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none are rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). More importantly, "no one phrase, sentence, or section of a contract should be isolated from its setting and considered apart from the other provisions." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). Accordingly, the Court of Appeals correctly rejected Petitioner's out-of-context use of "howsoever arising" and the District Court's reliance on the headings of the Endorsement rather than the entire section (Petition, App. 5-7).

Accordingly, after construing the policy as a whole as Texas law requires, the Court of Appeals concluded that the policy required a physical loss and that the endorsement required the calculation of physical losses based on final, corrected survey reports (as the surveyor may "repeat (and certify to) such measurements as frequently as he deems necessary and desirable"). The Fifth Circuit found Petitioner's argument to the contrary to have no merit, and Petitioner has not presented any arguments in the Petition which were not included in the case below. The opinion presents neither a circuit conflict nor a departure from the accepted and usual course of judicial proceedings. Accordingly, there is no reason for the Court to grant up the Petition.

II. The Fifth Circuit correctly determined under Texas law that the policy required a physical loss and did not cover financial losses.

Under Texas law, even under an "all risk" policy of insurance, the insured must first prove "loss or damage to the insured property" before the burden shifts to the insurer to show the loss arose from an excluded cause. *Dow Chem. Co. v. Royal Indem. Co.*, 635 F.2d 379, 386 n.8 (5th Cir. Unit A 1981). Furthermore, even under an "all risk" policy, "once the insurer pleads an exception to coverage, the [insured] retains his usual burden of proving that the cause of the loss is within the coverage of the policy." *Id.*; *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), *overruled on other grounds*, *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

Read as a whole, the policy provides that the insurance "covers against all risks of physical loss or damage to the

subject matter insured from any external cause but specifically excluding unexplained shortage or unexplained loss in weight (or volume)." The terms of the endorsement do not alter the policy's requirement of physical loss to cover purely economic losses, as the endorsement defines a "loss" as a comparison of "the survey or surveys made at points of origin with the survey or surveys made at point of destination, subject always to the deductible . . ."

The Fifth Circuit found Petitioner's argument to the contrary to have no merit, and Petitioner has not presented any arguments in the Petition which were not included in the case below. The opinion presents neither a circuit conflict nor a departure from the accepted and usual course of judicial proceedings. There is, therefore, no reason for the Court to grant the Petition.

CONCLUSION

Petitioner has identified no basis for the Court to grant certiorari in this matter. Although Petitioner apparently believes (without legal justification) that the Fifth Circuit reached the wrong conclusion, this belief does not qualify Petitioner's case for review by the Supreme Court of the United States. Respondents therefore respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

George F. Chandler, III
Hill Rivkins & Hayden LLP
712 Main Street, Suite 1515
Houston, TX 77002-3209
(713) 222-1515

Attorneys for Respondents